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No. 01-618

In the Supreme Court of the United States

ERIC ELDRED, ET AL., PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the 20-year extension of the terms of all unexpired copyrights, set forth in the Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827, violates the Copyright Clause of the Constitution insofar as it applies to works in existence when it took effect.

2. Whether the CTEA's 20-year extension of the terms of all unexpired copyrights violates the First Amendment.

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BRIEF FOR THE RESPONDENT

STATEMENT

1. The Copyright and Patent Clause of the Constitution confers upon Congress the "Power * * * [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, § 8, Cl. 8. Enacted in 1790, the Nation's first copyright statute provided a federal copyright term of 14 years from the date of publication, renewable for an additional 14 years if the author survived the first term. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790 Copyright Act). The 1790 Copyright Act applied its renewable 14-year term to subsisting works and future ones alike. *Ibid.* Congress expanded the federal copyright term to 42 years in 1831 (28 years from publication, renewable for 14 additional years), and to 56 years in 1909 (28 years from publication, renewable for 28 additional years). Both times, Congress applied the new copyright term to newly created and subsisting works alike. Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439 (1831 Copyright Act); Act of Mar. 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1080-1081 (1909 Copyright Act).

Under those statutes (and until the 1976 Copyright Act, 17 U.S.C. 101 *et seq.*), federal law was part of a dual system of copyright protection. Before a work was published, state law afforded its author an exclusive right to publish it. That "common-law copyright" or "right of first publication" attached "from the moment of [a work's] creation" and continued "in perpetuity"—"unless and until the work was published." 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 4.01[B], at 4-5 to 4-6 (1999) (*Nimmer on Copyright*); *id.* at OV-3; *id.* § 2.02, at 2-18. Accord, P. Goldstein, *Copyright* § 3.1, at 3:4-3:5 (1998); *id.* § 3.2.2, at 3:11. Following initial publication, federal copyright law granted authors an exclusive right to publish or reproduce their works during the specified term. See *Nimmer on Copyright* § 4.01[B], at 4-5. Thus, under the 1909 Copyright Act, the combined state-federal term stretched from creation to publication under state law (no matter how long that interval), *plus* up to 56 years after publication under federal law.

The 1976 Copyright Act abolished the dual system of copyright protection. Specifically, the 1976 Act preempted state law protection for unpublished works, and provided that federal protection generally would last from the work's creation until 50 years after the author's death. 17 U.S.C. 301(a), 302(a) (Supp. II 1978). The 1976 Act thus aligned United States copyright terms with the then-dominant international standard adopted under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention Amendments of 1908). For anonymous works, pseudonymous works, or works made for hire, Congress provided a term of 75 years from publication or 100 years from creation, whichever expired first. 17 U.S.C. 302(c) (Supp. II 1978).

The 1976 Act applied the new copyright terms to all works not published by the Act's effective date, regardless of when such works were created. 17 U.S.C. 303 (Supp. II 1978). For published works with subsisting copyrights, Congress provided parity by granting a copyright term of 75 years, 17

U.S.C. 304(a) and (b) (Supp. II 1978), the average duration of a copyright under the life-plus-50-year standard. See Staff of House Comm. on the Judiciary, 87th Cong., 1st Sess., *Report of the Register of Copyrights on the General Revision of U.S. Copyright Law* 50 (Comm. Print 1961).[1]

In 1998, Congress again adjusted the terms of federal copyrights. See Copyright Term Extension Act of 1998 (CTEA or Act), Pub. L. No. 105-298, 112 Stat. 2827. Under the CTEA, most copyrights now last from creation until 70 years after the author's death. 17 U.S.C. 302(a). For anonymous works, pseudonymous works, and works made for hire, the term is 95 years from publication or 120 years from creation, whichever expires first. 17 U.S.C. 302(c). The CTEA's standard of life-plus-70-years harmonizes the baseline United States copyright term with the term adopted by the European Union in 1993. Pet. App. 13a. Like all previous copyright term amendments, the CTEA applies its new term to future and subsisting copyrights alike. 17 U.S.C. 304.

2. Petitioners filed this lawsuit as a facial challenge to the CTEA's constitutionality. On cross-motions for judgment on the pleadings, the district court entered judgment for the government. Pet. App. 34a-39a. The court held that Congress had not violated the "limited Times" requirement of the Copyright Clause because the CTEA's term, although longer than that under the 1976 Act, is still limited rather than perpetual and thus within Congress's discretion. *Id.* at 37a & n.7. See also *id.* at 37a (noting this Court's determination that Congress may "enact retrospective laws under

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[1] Congress did not directly apply the life-plus-50-year term to previously published works because that would have shortened the duration of protection for many such works (*e.g.*, posthumously published works) and would have caused some copyrights to expire immediately. Congress did apply the life-plus-50-year term to subsisting *unpublished* works, but also provided that copyrights in such works would in any event expire no earlier than December 31, 2002, and if published by that date, no earlier than December 31, 2027. See 17 U.S.C. 303 (Supp. II 1978).

the copyright clause") (citing *McClurg* v. *Kingsland*, 42 U.S. (1 How.) 202, 206 (1843)). The district court also held that "there are no First Amendment rights to use the copyrighted works of others." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-16a. The court unanimously held that petitioners' First Amendment claim was foreclosed by *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985). Pet. App. 5a. Copyright, the court explained, does not impermissibly restrict free speech because it grants the author an exclusive right only to the specific form of expression, not the idea or fact being expressed. See *id.* at 5a-6a.

A majority of the court of appeals also rejected petitioners' contention that the constitutional requirement that copyrights endure only for "limited [t]imes" should be "interpreted not literally but rather" in light of the Copyright Clause's "preambular statement of purpose," which is "To promote the Progress of Science and useful Arts." Pet. App. 10a. That argument was deemed foreclosed by *Schnapper* v. *Foley*, 667 F.2d 102 (D.C. Cir. 1981), cert. denied, 445 U.S. 948 (1982), and by petitioners' concession that the preamble is not a substantive limit on Congress's legislative power. "[O]ne cannot concede that the preamble 'is not a substantive limit,'" the court stated, "yet maintain that it limits the permissible duration * * * more strictly than does the textual requirement that it be for a 'limited Time.'" Pet. App. 10a-11a.[2]

Because petitioners did not argue that the preambular phrase independently limits Congress's power to enact copyright legislation, the court declined to address that issue. Pet. App. 9a-11a. The court observed that if it were to address the argument, it "might well hold that the application of the CTEA to subsisting copyrights is 'plainly adapted' and 'appropriate' to 'promot[ing] progress,'" because the CTEA encourages copyright holders to restore and distribute works that might otherwise be lost forever. *Id.* at 12a (citing S. Rep. No. 315, 104th Cong., 2d Sess. 12 (1996)).

[2] The court unanimously rejected petitioners' argument that Congress "cannot extend an extant copyright," because a preexisting "copyrighted work already exists and therefore lacks originality." Pet. App. 8a. A "work with a subsisting copyright," the court explained, "has already satisfied the requirement of originality, and need not do so anew for its copyright to persist." *Ibid.*

Finally, the court held that nothing in the constitutional text or its history "suggests that a term of years for a copyright is not a 'limited Time' if it may later be extended for another 'limited Time.'" Pet. App. 12a-13a. The First Congress "made the Copyright Act of 1790 applicable to subsisting copyrights arising under [state] copyright laws," *id.* at 13a, and that practical construction of the Constitution by the Framing generation "is of itself entitled to very great" and sometimes "almost conclusive" weight. *Id.* at 14a. Furthermore, the court of appeals found that *McClurg* v. *Kingsland*, 42 U.S. (1 How.) 202, 206 (1843), made it "plain" that Congress can "amplify the terms of an existing patent." Pet. App. 14a-15a.

In rejecting petitioners' assertion that Congress might string together "an unlimited number of 'limited Times,'" the court held that such "clearly is not the situation before us." Pet. App. 13a. The CTEA merely "matches United States copyrights to the terms of copyrights granted by the European Union." *Ibid.* "In an era of multinational publishers and instantaneous electronic transmission, harmonization in this regard has obvious practical benefits" and is "a 'necessary and proper' measure to meet contemporary circumstances rather than a step on the way to making copyrights perpetual." *Ibid.*

Judge Sentelle dissented in part. He concluded that Congress had exceeded its power under the Copyright Clause by expanding the term of subsisting works. Pet. App. 16a-23a.

4. The court of appeals denied rehearing and rehearing en banc. Pet. App. 24a-27a. The majority clarified that, because petitioners had not argued that the preambular phrase is an independently cognizable limit on Congress's copyright

powers, that issue was not properly before the court. *Id.* at 25a. Judge Sentelle, joined by Judge Tatel, dissented. *Id.* at 28a-33a.

This Court granted certiorari, limited to the first two questions presented in the petition. 122 S. Ct. 1062; 122 S. Ct. 1170.

SUMMARY OF ARGUMENT

I. Every congressional modification of copyright terms in United States history has been applied to both future and subsisting works. Since the CTEA's term of life-plus-70-years is not unlimited or perpetual, it satisfies the constitutional mandate that copyrights last only for "limited Times." Within that one constraint, Congress's choice of particular copyright terms, and of works protected thereby, is entitled to great deference and must be upheld if that choice is a necessary and proper exercise of legislative power.

Congress's decision to apply the CTEA to subsisting works meets that test. First, it is rational for Congress to treat authors' original works equally, regardless of whether created before or after the CTEA's enactment. Congress reasonably determined that demographic, economic, and technological changes warrant a longer term for all unexpired copyrights. Allowing fair compensation for holders of existing copyrights accomplishes that goal directly, and is also necessary and proper as an ancillary means of protecting future works. Congress might be less likely to respond to a perceived need to modify the term of copyright protection if it could not do so in a manner it deemed equitable. Further, this country's practice of granting evenhanded protection to authors of existing works—a tradition followed in statutes dating from the 1790 Copyright Act forward—increases incentives for the creation of future works and for initially publishing those works in the United States. Especially in a global market, Congress's decision to conform to certain international copyright standards rationally allows United States copyright holders to meet foreign competition

and thereby provides revenues to be invested in producing new works. Congress also rationally concluded that the CTEA's longer term would encourage holders of existing copyrights to make substantial investments in restoring and distributing their works, to the benefit of public discourse.

Petitioners in effect ask this Court to rewrite the governing constitutional language to allow Congress to secure copyrights only for "*inalterable* limited times *that promote the creation of new works.*" Neither the Constitution's text nor its history supports such substantial revisions, and two centuries of legislative practice and judicial decisions stand to the contrary.

Petitioners suggest that, although the CTEA's term is not impermissibly long, future courts might be unable to distinguish "limited Times" such as the CTEA's term from hypothetically unlimited, perpetual copyrights that Congress might someday enact. Congress has significantly revised the federal copyright term only five times in 210 years, however, and there is no basis for believing that upholding the CTEA would either lead Congress to adopt unlimited copyright extensions or require the courts to uphold such extensions. Ultimately, petitioners wish to displace Congress's preference for copyright-based dissemination of works during the CTEA's prescribed proprietary term, and instead to allow indiscriminate exploitation by public domain copyists like petitioners. But the Constitution assigns such policy choices to Congress, not the courts.

II. The CTEA does not impermissibly abridge freedom of speech. All copyright law, including the CTEA, protects authors' writings from unrestricted exploitation by others for "limited Times." This Court has recognized that the copyright system does not offend the First Amendment because it allows unrestricted use of the ideas and facts within copyrighted works, and also allows "fair use" of copyrighted expression itself. *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539 (1985). Since the CTEA fully preserves copyright's traditional safeguards for free speech,

it satisfies First Amendment standards under this Court's jurisprudence.

ARGUMENT

I. THE "LIMITED TIMES" REQUIREMENT DOES NOT PRECLUDE CONGRESS FROM APPLYING NEW COPYRIGHT TERMS TO FUTURE AND EXISTING COPYRIGHTS ALIKE

Throughout this Nation's history, Congress has exercised its power under the Copyright Clause (U.S. Const. Art. I, § 8, Cl. 8) by establishing and revising the "limited Times" during which federal copyright protection endures. Each time Congress has done so—in 1790, 1831, 1909, 1976, and most recently in 1998—Congress has applied the revised copyright term not only to future works, but to subsisting works as well. As Professor Arthur Miller observed, "since 1790, it has indeed been Congress's policy that the author of yesterday's work should not get a lesser reward than the author of tomorrow's work just because Congress passed a statute lengthening the term today." Symposium, *The Constitutionality of Copyright Term Extension*, 18 Cardozo Arts & Ent. L.J. 651, 693 (2000).

Petitioners seek to countermand that established policy by arguing that the "limited Times" requirement bars Congress from applying new copyright terms to subsisting works. That argument is contrary to constitutional text and contradicts the First Congress's construction of the Constitution. Further, petitioners' argument ignores that Congress "may * * * implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim." *Graham* v. *John Deere Co.*, 383 U.S. 1, 6 (1966). Congress's longstanding practice of according authors of existing works the benefits of after-enacted legislation is a necessary and proper component of copyright legislation. Congress has reasonably concluded that its consistent practice *does* promote creativity and progress: It assures authors that they will not be unfairly

penalized for creating or publishing earlier rather than later; it gives owners of subsisting copyrights greater incentives to preserve, restore, disseminate, and publicly exploit works that would otherwise be lost forever; and it secures appropriate international protection for United States copyright holders' works, thereby also fostering international harmonization.

Petitioners place great weight on their exaggerated claim that Congress "now regularly escapes the restriction of 'limited Times' by repeatedly extending terms of existing copyrights—eleven times in the past forty years." Pet. Br. 2, 10, 18, 31. But petitioners fail to mention that all but two of those 11 purported changes (the 1976 Copyright Act and the CTEA) were temporary placeholders *subsumed* into the systemic change effected by the 1976 Copyright Act. In fact, Congress has made only two ultimate changes to copyright terms over the last 90 years, responding to rapid changes in economic, technological, international, and demographic circumstances. Indeed, the CTEA's "limited time" is in many respects shorter than the total term of protection provided, under a combination of state and federal law, during the first 180 years of the Republic. See pp. 24-25, *infra*.

Petitioners, in any event, do not assert that the CTEA's copyright term, as applied to future works, exceeds the "limited Times" requirement. On the contrary, they expressly disavow such a claim. Pet. Br. 14. But if the duration of the copyright term provided by the CTEA is "limited" as applied to future works, it must necessarily be "limited" as applied to existing ones as well.

A. Petitioners' Construction Is Foreclosed By Constitutional Text

The Copyright Clause does not textually distinguish between subsisting and future copyrights; it distinguishes between "limited" and "unlimited" periods of protection. Petitioners do not dispute that the CTEA's term is "limited" as applied to future works. Consequently, they struggle in

vain to define *the exact same time period* as "limited" when applied to one set of works (future works), but "unlimited" when applied to others (existing works).[3]

Petitioners' argument rests on the premise that a copyright term is not limited in the first instance if Congress can later increase it. But that confuses "limited Times" with "limited *and inalterable* times." At the time of the Framing, the term "limited" meant (as it does today) "confine[d] within certain bounds," "restrain[ed]," or "circumscribe[d]," T. Sheridan, *A Complete Dictionary of the English Language* (1789); 2 S. Johnson, *A Dictionary of the English Language (1755)* (1968) (*Johnson Dictionary*) (same); see also *Webster's New Int'l Dictionary* 1434 (2d ed. 1958) ("confined within limits"). Plainly, the copyright term provided by the CTEA is "limited" in that sense. It "confine[s]," "circumscribe[s]," and "bound[s]" the temporal scope of the author's exclusive right. Congress does not render a copyright term "unlimited" merely by extending the initial grant of protection, any more than courts render the time for filing briefs "unlimited" when they adjust briefing schedules, or than Congress renders statutes-of-limitations periods "unlimited" when it alters the "limited time" for initiating a lawsuit. As the district court observed, "If a limited time is extended for a limited time then it remains a limited time." Pet. App. 37a, n.7. The Framers' choice of the plural noun, empowering Congress to grant authors and inventors exclusive rights for "limited *Times*," also belies any intent to require a single, inalterable period.

Petitioners claim (Br. 17) that "limited" means "fixed," as opposed to changeable or variable. However, they cite no source from the Framing to support that definition, and the

[3] Petitioners imprecisely describe the application of a new term to subsisting works as "retroactive." Such new copyright terms govern the legality of *future* copying; they do not change the legal status of copying that has already occurred. Thus, the CTEA does not eliminate "vested rights" or attach new disabilities to past transactions. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269, 280 (1994).

modern dictionary they cite demonstrates that "fixed" is not an accepted meaning of "limited" and was not so at the time of the Framing.[4] Petitioners also claim (Br. 17-19) that "limited" means "certain," as in predictable or definite, stating that Charles Pinckney's proposed draft of the Copyright Clause used the phrase "a certain time" rather than "limited Times." In context, however, even "certain" would not have meant predictable or inalterable, since "certain" was (and is) often used "in an indefinite sense," to mean "some," "particular," or "specified." 1 *Johnson Dictionary*, *supra*; 2 *Oxford English Dictionary* 234 (1978) ("particularize[d] from the general mass, but which may be left without further identification or description"). In any event, although the Framers incorporated some elements from the Pinckney draft, they *rejected* the phrase "a certain time" and chose "limited Times" instead. Hence, though a word such as "fixed" or "inalterable" could have been used to restrict legislative power as petitioners propose, it is dispositive that no such word appears in the Constitution as written.

B. Historical Practice Confirms That "Limited Times" Does Not Mean A Single, Inalterable, Limited Time

"[E]arly congressional practice * * * provides 'contemporaneous and weighty evidence of the Constitution's meaning.'" *Alden* v. *Maine*, 527 U.S. 706, 743-744 (1999) (quoting *Printz* v. *United States*, 521 U.S. 898, 905 (1997)). As the Court observed in the copyright context:

> The construction placed upon the Constitution by the first [copyright] act of 1790 and the act of 1802, by the

[4] Petitioners cite *Webster's Second New International Dictionary* 1434 (1950), but omit the notation "*Obs.*," for "obsolete," which Webster's employs when the word has not been used with that meaning "in any important literary work since 1660"—over a century before the Constitution was drafted. *Id.* at xcii, 1682. See also *Webster's Third New Int'l Dictionary* 16a (1993) (indicating that the "temporal label *obs.* for 'obsolete' means that no evidence of standard use since 1755 has been found or is likely to be found").

> men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.

Burrow-Giles Lithographic Co. v. *Sarony*, 111 U.S. 53, 57 (1884). In this case, "contemporaneous legislative exposition, * * * acquiesced in for" more than two centuries, precludes petitioners' construction. *Myers* v. *United States*, 272 U.S. 52, 175 (1926).

1. First, it is significant that Congress has never provided for an inflexibly "fixed" or "certain" copyright term. Under the 1790 Copyright Act, for example, federal protection lasted for 14 years after a work's publication, and could be renewed for an additional 14 years *if* the author survived and applied for an additional term. See p. 1, *supra*. Similarly, under the 1831 and 1909 Copyright Acts, an author or eligible heir could seek renewal at the close of the initial term. *Ibid.*

Congress, moreover, has consistently applied new copyright terms to subsisting works. The 1790 Copyright Act applied its new term—up to 28 years of protection—to works "*already printed* within these United States"; to works "*already made and composed*, and not printed or published"; and finally to works "that *shall hereafter* be made and composed." Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (emphases added). Previously published works were among the first protected under that 1790 statute. See B. Bugbee, *Genesis of American Patent & Copyright Law* 155 (1967). The 1790 Copyright Act, moreover, granted a longer term of protection than was available under many state laws at the time those works were created.[5] The First Congress thus

[5] Whereas the new federal term could last up to 28 years, North Carolina had granted a single 14-year term, N.C. Copyright Act of 1785, ¶ 2; New Hampshire had provided a single 20-year term, N.H. Copyright Act of 1783, ¶ 2; and Massachusetts, Rhode Island, and Virginia had provided a single 21-year term, Mass. Copyright Act of 1783, ¶ 3; R.I. Copyright Act of 1783, ¶ 2; Va. Copyright Act of 1785, § 1. Delaware never enacted a copyright law, and Maryland's and Pennsylvania's copyright statutes never became effective. Md. Copyright Act of 1783, § VI (Act to become effective only after adoption of similar laws by all States); Penn. Copyright Act of 1784, § VII (similar). See generally Library of Congress, *Copyright Enactments of the United States 1783-1906* (1906) (reprinting state statutes).

unquestionably understood that it had authority to apply a new, more favorable copyright term to existing works.

Each Copyright Act since 1790 has reflected that understanding. In 1831, when Congress doubled the initial term (from 14 to 28 years following publication), Congress applied that benefit to future works and subsisting copyrights alike. Act of Feb. 3, 1831, ch. 16, § 16, 4 Stat. 439. When Congress in 1909 changed the renewal term from 14 years to 28 years, it also applied that change to both future and subsisting copyrights, Act of Mar. 4, 1909, ch. 320, § 24, 35 Stat. 1080-1081; and the changed copyright term under the 1976 Act again accorded durational parity to future and existing copyrights. See 17 U.S.C. 302-304 (Supp. II 1978); pp. 2-3 & n.1, *supra*.

Petitioners' view is likewise inconsistent with Congress's historical practice of using its Copyright and Patent Clause authority to extend the terms of individual patents and copyrights for equitable reasons, such as where the creator had not obtained the "fair" return the prior Congress presumably had contemplated. In 1808, Congress extended the term of one individual's patent for such reasons, Act of Jan. 7, 1808, ch. 6, 6 Stat. 70; it extended the term of another in 1809, Act of Mar. 3, 1809, ch. 35, 6 Stat. 80; it did so again in 1815, Act of Feb. 7, 1815, ch. 36, 6 Stat. 147, and many times thereafter. See T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyright Soc'y of the U.S. 19, 65, 72 (2001). Since 1828, Congress has likewise enacted private bills to extend copy-

rights for individual, existing works. See, *e.g.*, Act of May 24, 1828, ch. 145, 6 Stat. 389 (extending term of copyright granted to J. Rowlett); T. Ochoa, 49 J. Copyright Soc'y of the U.S. at 48-49.[6]

Significantly, such extensions were upheld by the courts. In rejecting a challenge to the 1808 patent extension, Justice Bushrod Washington—a member of the 1787 Virginia House of Delegates that ratified the Constitution—declared that Congresses "have the exclusive right by the constitution to limit the times for which a patent right shall be granted, and are not restrained from renewing a patent or prolonging the time of its continuation." *Evans* v. *Robinson*, 8 F. Cas. 886 (C.C.D. Md. 1813) (No. 4571), aff'd, 16 U.S. (3 Wheat.) 454 (1818); accord *Evans* v. *Jordan*, 8 F. Cas. 872 (C.C.D. Va. 1813) (No. 4564) (Washington, J.), aff'd, 13 U.S. (9 Cranch) 199 (1815). Justice Story would later reach the same conclusion, specifically affirming Congress's authority to enact a 14-year patent extension that "operates retrospectively":

> For myself, I have never entertained any doubt of the constitutional authority of congress to make such a grant. * * * [I]t rests in the sound discretion of congress to say when and for what length of time and under what circumstances the patent for an invention shall be granted. There is no restriction, which limits the power of congress to enact, where the invention has not been known or used by the public.

Blanchard v. *Sprague*, 3 Fed. Cas. 648, 650 (C.C.D. Mass. 1839) (No. 1518). Thus, while petitioners repeatedly cite

[6] Petitioners (Br. 20-21) and their amici (Ochoa Br. 23-24) assert that Rowlett's 1828 term extension relied on the "sweat of the brow" doctrine rejected in *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340 (1991). Whatever the validity of Rowlett's *initial copyright*, however, Congress's decision to extend it manifested Congress's clear understanding that the "limited Times" requirement does not bar Congress from substituting a new term for an earlier one that seems inadequate.

Justice Story as reflecting the Framers' "clear intent," Pet. Br. 10, 12, 39, Justice Story ruled that Congress *could* extend the terms of protection for subsisting works.[7] As an amicus supporting petitioners concedes (in his article but not in his brief), petitioners' proposed bar on term extensions for existing works is "difficult to maintain in light of the long history of patent term extensions which were upheld in the mid-nineteenth century." Ochoa, 49 J. Copyright Soc'y of the U.S. at 125.

2. Petitioners concede (Pet. Br. 30) that their contention "would cast into doubt the 1831 and 1909 Acts, and possibly the 1976 Act" as well. Nonetheless, petitioners and their amici dismiss those Acts as "mistaken" because "no Framer sat in Congress in 1831," Pet. Br. 31, and only one "delegate to the 1787 Constitutional Convention * * * remained in Congress" in 1808, Ochoa Br. 23. Those contentions overlook, however, that then-President Thomas Jefferson—the first administrator of the patent system, and perhaps the Founder with the narrowest view of the copyright and patent powers—signed the 1808 and 1809 patent term extensions into law; that James Madison, who drafted the Constitution's "limited Times" language, issued the extended patents under those laws as Secretary of State; and that Madison as President signed another patent term extension in 1815. See pp. 13-14, *supra*. Petitioners and their amici thus ask this Court to repudiate two centuries of

[7] Petitioners' reliance (Br. 10, 12) on Justice Story's characterization of copyright terms as "short" is also misplaced. First, petitioners do not allege that the CTEA's term is too "long" to be "limited." Pet. Br. 14. Second, "limited" does not mean "short," and even in Justice Story's time copyright protection ran from creation to publication under state law (no matter how long that interval), *plus* 42 additional years after publication under federal law. Third, contrary to petitioners' incomplete quotations, Justice Story did not declare that works must "pass into the public domain 'without restraint,'" but rather that, *upon the expiration of the patent or copyright*, the works become available to the public for "full possession and enjoyment * * * without restraint." J. Story, *Commentaries on the Constitution* § 558, at 402-403 (photo. reprint 1987) (1832).

settled practice as resting on a "mistaken" understanding that James Madison, Thomas Jefferson, and Justices Washington and Story all apparently shared.[8]

Petitioners' theory also cannot credibly be reconciled with the 1790 Copyright Act. Petitioners' fundamental submission would forbid any extension of existing copyrights "because the incentive is being given for work that has already been produced." Pet. Br. 22. But petitioners concede that the 1790 Copyright Act applied its new copyright term to works that had "already been produced." And although petitioners assert that the 1790 Act "did not extend the terms of existing copyrights" but rather "created" new ones, *id.* at 28, that makes no difference under petitioners' theory. In petitioners' view, Congress may not provide *any* incentive regarding subsisting works, because the works have "already been produced." *Id.* at 22, 28. Moreover, the First Congress did not merely apply its new copyright term to subsisting works; it *extended* and *strengthened* legal protection (temporally and geographically) beyond that available when the authors created them. See pp. 12-13 & n.5, *supra*.

Recognizing as much, petitioners claim (Br. 30) that the 1790 Act merely "address[ed] fundamental issues of transition" from the prior state-law system using a "relatively

[8] Petitioners suggest (Pet. Br. 29; Ochoa Br. 25-26) that the 1831 Congress "mistakenly" understood copyright to be a creature of "natural law," a view that (they claim) was rejected two years later in *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591 (1834). But two years *after Wheaton*, Congress altered the terms for patents—which were never thought to derive from natural rights—and applied the alteration to both existing and future inventions. Act of July 4, 1836, ch. 357, § 5, 5 Stat. 119. Moreover, "natural rights" theories aside, the phrase "limited Times" either bars Congress from applying new copyright terms to existing works or it does not; the 1831 Congress was obviously of the latter view, primarily based on utilitarian reasoning, 7 Cong. Deb. 424 (1831) (stating that the Act would "enhance the literary character of the country," and decrying proposals to punish authors for publishing earlier rather than later). See also p. 30, *infra*.

uncumbersome method." That is unpersuasive. The "limited Times" requirement does not contain any "transition" exception, and petitioners never explain how applying the 1790 regime *to existing works*—thereby imposing new registration and deposit requirements (see 1790 Copyright Act, ch. 15, §§ 1, 3, 1 Stat. 124-125)—made the transition significantly less cumbersome. The First Congress did not describe the 1790 Act's application to existing works as a one-time necessity, and successive Congresses have also applied new terms to existing works. Besides, to the extent that addressing transitional issues, enhancing uniformity, and avoiding cumbersome results are permissible justifications, they also support the CTEA. See pp. 37-38, *infra*.[9]

3. Preconstitutional practice similarly undermines petitioners' position. The Statute of Anne, a partial model for the 1790 Act, applied a new copyright term to existing works. See 8 Anne, ch. 19 (1710) (Eng.). So did the preconstitutional state copyright statutes, which served as "examples to national lawmakers—of whom some" (including Madison and Pinckney) "were the very men who had drafted, considered or supported these state laws." Bugbee, *supra*, at 124.[10] Neither constitutional text nor contemporaneous debates suggest any unstated intent to ban that

[9] Petitioners' related assertion (Br. 28-29) that the federal term was "compensation" for displaced state- or common-law protections is based on the dubious premise that such protections were pre-empted, Bugbee, *supra*, at 124, and overlooks that state copyright terms were often shorter than the federal copyright term, and were in three instances nonexistent. See pp. 12-13 & n.5, *supra*. In any event, petitioners' claim that the 1790 Copyright Act permissibly "compensate[d]" authors of previously created works is fundamentally inconsistent with their general theory.

[10] Three state statutes, like the 1790 Copyright Act, accorded protection to all previously printed works. S.C. Copyright Act of 1784, ¶ 1; Va. Copyright Act of 1785, § 1; N.Y. Copyright Act of 1786, ¶ 1. Six protected works created before, but printed after, the statute's enactment. N.C. Copyright Act of 1785, ¶ 2; N.J. Copyright Act of 1783, § 1; Ga. Copyright Act of 1786, ¶ 2; Mass. Copyright Act of 1783, ¶ 4; N.H. Copyright Act of 1783, ¶ 2; R.I. Copyright Act of 1783, ¶ 3.

established, preconstitutional practice, which Congress has continued for centuries since.

Lacking support anywhere in the Constitution's text, structure, drafting history, or implementation, petitioners instead cite the Framers' alleged general antipathy toward monopolies and toward the "strong control" and censorship that publishers had exercised in England. Pet. Br. 24-26. But petitioners cite no evidence that the Framers responded by prohibiting Congress from altering copyright terms for both existing and future works. To the contrary, petitioners concede that the Framers' principal response was to grant exclusive rights to *authors* and *inventors*—who were numerous, diffuse, and whose works would naturally compete with each other—thereby checking market power and centralized control without restricting legislative authority. *Id.* at 26-27. With respect to selecting and modifying statutorily "limited Times," the Framers placed their faith in the people's representatives by generally assigning Congress "the task of defining the scope of the limited monopoly that should be granted to authors or inventors in order to give the public appropriate access to their work product." *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).[11]

C. Petitioners' Construction Of "Limited Times" In Light Of The Preamble Contradicts Constitutional Text And Case Law

Petitioners do not argue that the Copyright Clause's preamble is an independently enforceable limit on Congress's powers; in the court of appeals, petitioners conceded that it is not. Pet. App. 10a. The court of appeals therefore held

[11] Indeed, responding to Thomas Jefferson's concerns about the evils of monopoly, Madison asked: "Is there not also infinitely less danger of this abuse in our Governments than in most others?" Where, "as with us," "the power * * * is in the many not in the few the danger cannot be very great that the few will be thus favored." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 1 *The Republic of Letters* 566 (J. Smith ed. 1995).

that the preamble's independent enforceability was not properly before it, *id.* at 11a-12a, 24a-27a, and this Court declined to review that conclusion, see Order of Feb. 25, 2002 (limiting grant of certiorari).

Nonetheless, petitioners argue that the meaning of the "limited Times" requirement "must be determined in light of [the preamble's] specified end." Pet. Br. 19. But petitioners do not show how such illumination could convert "limited Times" into "a single and inalterable limited Time." In effect, petitioners boldly propose to rewrite the Copyright Clause, moving the phrase "To promote the Progress" to a position after "limited Times," and transforming that phrase into an adjectival limitation. An "extension of existing copyrights cannot be a 'limited Time[]' *that* 'promote[s] the Progress of Science,'" petitioners argue, "because the incentive is being given for work that has already been produced." *Id.* at 22 (emphasis added).

That argument is textually incoherent. The Framers did not require Congress to select "*limited Times that* promote" progress, any more than they intended so to limit or modify other nouns in the Clause, *i.e.*, by allowing Congress to protect only "*Authors that* promote" progress, or "*Writings that* promote" progress. See *Mitchell Bros. Film Group* v. *Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980). By proposing to convert the Constitution's grant of power into a limitation, petitioners seek to avoid the ordinary "necessary and proper" standard of review applicable to Congress's Article I enactments. See *ibid.*; pp. 28-29, *infra*. As Nimmer explains, the preamble "must be read as largely * * * indicating the purpose of the power but not in limitation of its exercise." 1 *Nimmer on Copyright* § 1.03[A], at 1-66.19 (footnotes omitted). Especially in light of Congress's longstanding and consistent legislative practice, see pp. 11-18, *supra*, petitioners' attempt to rewrite the Copyright Clause must be rejected.

This Court's cases similarly contradict petitioners' argument. In *McClurg* v. *Kingsland*, 42 U.S. (1 How.) 202 (1843), for example, the Court applied changes in patent law to a plaintiff's previously granted patent:

> [The applicable law] depend[s] on the law as it stood at the emanation of the patent, *together with such changes as have been since made; for though they may be retrospective in their operation, that is not a sound objection to their validity*; the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints on its exercise, *there can be no limitation of their right to modify them at their pleasure*, so that they do not take away the rights of property in existing patents.

Id. at 206 (emphases added). The Court recognized that the disputed patent "would have been void" when the process was patented (1834-1835), because the patentee had allowed his employer briefly to practice the invention before obtaining the patent. *Id.* at 205, 207. But the Court held that an 1839 amendment, which exempted brief uses by an employer, had "relieved" the plaintiff "from the effects of former laws and their constructions by this court." *Id.* at 209. Petitioners cannot explain how their theory would permit Congress to apply an 1839 amendment to a process patented years earlier, since the change could not (in their view) operate as an incentive to invent and disclose that (already invented and disclosed) process. *McClurg* similarly refutes petitioners' claim that the Copyright Clause requires a "quid pro quo" of new creation in exchange for any increased legal protection, Pet. Br. 16, 23.[12]

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[12] While a quid pro quo concept occasionally appears in this Court's cases, it ordinarily describes the conditions *Congress* has established for *patents*, *e.g.*, disclosure to the public in exchange for a period of exclusive rights. See, *e.g.*, *Pennock* v. *Dialogue*, 27 U.S. (2 Pet.) 1, 23 (1829) (if an invention is already commonly known and used when the patent is sought, "there might be sound reason for presuming, *that the legislature* did not intend to grant an exclusive right" given the absence of a "quid pro quo." (emphasis added)). None of the cases cited by petitioners holds that Congress is precluded from enhancing copyright protections for subsisting works.

Although both courts below relied on *McClurg* expressly, Pet. App. 14a-15a, 37a, petitioners fail even to mention that decision. Instead, petitioners rely on *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340 (1991), which does not analyze "limited Times" and does not support petitioners' theory. *Feist* held that, because copyright requires originality—some creative effort by the author—factual compilations are subject to copyright only if, and only to the extent that, the author adds creativity by independently selecting and arranging the facts. See *id.* at 346-348; pp. 22-23 n.14, *infra*. *Feist* derived that requirement not from the Copyright Clause's preamble (as petitioners contend), but rather from the words "Writings" and "Authors" in the Clause itself. "In two decisions from the late 19th century," *Feist* observes, "this Court defined the crucial terms 'authors' and 'writings'" and, "[i]n so doing, * * * made it unmistakably clear that *these terms* presuppose a degree of originality." 499 U.S. at 346 (emphasis added). Similarly, *Feist* explains that one cannot be the "author" of "facts" because facts have an independent existence and thus do not "owe [their] origin" to an "author" as "maker." *Ibid.*[13]

Petitioners' reliance (Br. 21) on *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), and *Graham* v. *John Deere Co.*, 383 U.S. 1 (1966), is also misplaced. Like *Feist*, those cases did not concern "limited Times," the validity of an Act of Congress, or the application of new copyright

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[13] The Court mentioned the preamble only once in *Feist*, and it did so to explain why others may use the "fruits of the compiler's labor," such as facts and ideas, without compensation. Because "the primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts,'" the Court explained, copyright protects the "author's original expression, but allows others to build freely upon the *ideas* and *information* conveyed by a work." 499 U.S. at 350 (emphasis added).

terms to subsisting works. In fact, *Bonito Boats* invalidated a *state* law because it "clashe[d] with the balance struck *by Congress* in our patent laws." 489 U.S. at 152 (emphasis added). "It is *for Congress* to determine," the Court declared, "if the present system" effectuates the Copyright and Patent Clause's goals. *Id.* at 168; see *id.* at 165-167 (emphasizing that Congress may balance competing concerns). *Graham* concerned the construction and application of the 1952 Patent Act, and dictum in that case emphasized that Congress "may implement the stated purpose of the Framers by selecting the policy which *in its judgment* best effectuates the constitutional aim." 383 U.S. at 6 (emphasis added).

Petitioners rely (Br. 21) on this Court's statement that Congress may not "remove existent knowledge from the public domain." *Bonito Boats*, 489 U.S. at 146 (quoting *Graham*, 383 U.S. at 6). But the CTEA does not remove anything from the public domain. Like an initial term of copyright, it merely delays the entry of an author's original expression into the public domain. More fundamentally, copyrights cannot "remove existent *knowledge* from the public domain," because copyright protects only the author's particular expression and (unlike a patent) does not bar others from exploiting the underlying idea or knowledge. See pp. 40-41, *infra*. Indeed, even if there were some barrier against reclaiming particular expression from the public domain—an issue that should be reserved for another day—it would not naturally derive from the language of the preamble. See Br. in Opp. 14.[14]

[14] Petitioners mischaracterize *Bonito Boats* as having "held" that "'monopolies' are *not permitted* under the Copyright Clause when there is no 'concomitant *advance* in the Progress of Science and useful Arts.'" Pet. 21 (some emphasis added). In fact, *Bonito Boats* merely noted that the Patent Clause "*reflects a balance* between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance." 489 U.S. at 146 (emphasis added). Moreover, unlike patent law's "novelty" requirement (discussed in *Bonito Boats*), copyright's "originality" requirement does not demand an "advance" over prior art. Instead, an author may obtain protection for expression or an "arrangement *that others have used*; novelty is not required. Originality requires only that the author make" his creative contribution "independently (*i.e.*, without copying that selection or arrangement from another work)." *Feist*, 499 U.S. at 358 (emphasis added). See *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir.) (Hand, J.), cert. denied, 298 U.S. 669 (1936).

As the court of appeals unanimously recognized, applying the CTEA to subsisting copyrights does not (as petitioners contend) protect works that lack originality. The CTEA, like the 1790 Copyright Act, merely applies a new copyright term to "original" works that properly qualified for copyright protection in the first instance. Pet. App. 9a. Contrary to petitioners' argument (Br. 32-33), *Feist*'s "originality" requirement determines only whether a work is eligible for copyright protection; it has no relevance to the "limited Times" for which a work may be protected. Indeed, petitioners' interpretation of the originality requirement would invalidate the copyright acts passed by the First Congress and by Congresses thereafter, each of which applied new copyright terms to subsisting works.

D. Petitioners' Concerns About Perpetual Protection Are Unfounded

Petitioners' argument ultimately rests on a bleak prophecy that—unless this Court bars the application of new copyright terms to existing works—Congress might continually increase terms to provide "a perpetual term 'on the installment plan.'" Pet. Br. 18. But that has not happened here. Congress merely established a longer, but still "limited," copyright term that our trading partners had adopted, and it applied that term evenhandedly to future and subsisting works alike.

History belies petitioners' claim that Congress "now regularly escapes the restriction of 'limited Times' by repeatedly extending terms of existing copyrights." Pet. Br. 2. During this country's first 120 years, Congress significantly altered

copyright terms three times: In 1790, Congress established a term of up to 28 years following publication, which it increased to 42 years in 1831, and to 56 years in 1909. See pp. 1, 12-13, *supra*. In the last 90 years, Congress has ultimately altered the federal copyright term only twice, adopting a term of life-of-the-author plus 50 years in 1976, and increasing it to life-plus-70-years in 1998.[15] Of those two recent term amendments, the 1976 Act *reduced* many works' total copyright term. Before the 1976 Act, unpublished works could receive potentially infinite protection under state law ("common-law copyright"). See p. 2, *supra*. By preempting state law protection in favor of a single, finite, federal term, the 1976 Act "played a major role in harmonizing and, to some extent, curtailing the duration of copyright, at least with respect to that deceptively large class of unpublished works formerly protected by common law copyright." 18 Cardozo Arts & Ent. L.J. at 693 (Prof. Ginsburg). See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 134-135, 139 (1976). Indeed, that curtailment will cause centuries of unpublished works, previously entitled to eternal protection, to enter the public domain on December 31, 2002. See p. 3 n.1, *supra*. Moreover, although petitioners claim that the 1976 Act increased the average copyright term by 19 years (from 56 years under the 1909 Act to an average of 75 years), they overlook that the total pre-1976 term had lasted from creation to publication under state law, see, *e.g.*,

[15] With respect to term extensions enacted between 1962 and 1976 (Pet. Br. 2 & n.1), while Congress was drafting the 1976 Copyright Act, "[e]verybody knew that when the 1976 Act was enacted, the worldwide life plus fifty standard was going to be adopted. Congress determined that works whose copyrights would expire during the time the Act was being revised should not be left behind simply because Congress took fifteen years to enact what became the 1976 Copyright Act." 18 Cardozo Arts & Ent. L.J. at 693 (Prof. Ginsburg). Those extensions thus were incorporated into, and wholly replaced by, the term established by the 1976 Copyright Act. See p. 9, *supra* (correcting petitioners' claim that Congress has increased copyright terms 11 times in 40 years).

1909 Act, ch. 320, § 2, 35 Stat. 1076, *plus* 56 *additional* years after publication under federal law. See p. 2, *supra*.

Historical practice also demonstrates that Congress has been rather conservative in revising copyright terms. When Congress altered the federal copyright term in 1831, it recognized that many European nations had already adopted terms of life-plus-50-years or longer. H.R. Rep. No. 3, 21st Cong., 2d Sess. 2 (1831). Congress declined to adopt that standard, instead increasing the maximum federal term from 28 years to 42 years. When Congress revisited the issue in 1909, life-plus-50-years had become the international standard under amendments to the Berne Convention. But Congress again did not adopt that standard, instead increasing the maximum federal term to 56 years. It was not until 67 years later, in 1976, that Congress finally adopted the then-prevailing international standard.

By 1976, however, demographic and economic changes had overtaken that standard. The Berne Convention had incorporated the life-plus-50-year term in 1908 to provide compensation during authors' lives and during the lives of any children or grandchildren.[16] Because life expectancies increased substantially during the 20th century (for offspring as well as authors), and because people now often have children later in life, the European Union in 1993 altered the term to life-plus-70-years. See E.U. Directive on Copyright, pmbl. ¶ 5 (because the "average lifespan in the Community has grown longer," the prior term "is no longer sufficient to cover two generations"). Viewed against that background, Congress hardly acted precipitously when it likewise found the life-plus-50-year term inadequate and changed the United States copyright term to life-plus-70-years. See also

[16] See *Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights*, 1993 Official J. Eur. Cmty. 290, pmbl. ¶ 5 (E.U. Directive on Copyright) ("[T]he minimum term of protection laid down by the Berne Convention * * * was intended to provide protection for the author and the first two generations of his descendants.").

p. 33 & nn.23-24, *infra*. To the contrary, that change was "overdue." 141 Cong. Rec. 6553-6554 (1995) (statement of Sen. Feinstein).

The two increases in copyright terms effected since the 1909 Act are proportionate to demographic and economic changes during the same period. Between 1900 and today, the average life span has increased by as much as 30 years; photocopying and digital media have lowered copying costs; new markets and media have increased the value and commercial life of works; and losses due to piracy have increased. S. Rep. No. 315, 104th Cong., 2d Sess. 12 (1996); W. Landes & R. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 363 (1989) (Landes & Posner). Under traditional copyright policy, each of those changes tends to justify a longer copyright term. See H.R. Rep. No. 1476, *supra*, at 134-135; S. Rep. No. 315, *supra*, at 6, 12; Landes & Posner, *supra*, at 344 ("optimal extent of copyright protection tends to rise with the value of a work"); *id.* at 363 ("the lower the cost of copying the greater the optimal scope of copyright protection").[17]

[17] Even though petitioners do not claim that life-plus-70-years is too long, their amici argue that the last 20 years of protection do not, when discounted to present value, provide a significant portion of the total return. Congress considered that claim, however, and found it unpersuasive. See S. Rep. No. 315, *supra*, at 12. Shorter terms discriminate against serious works of authorship, whose value is often discovered only long after they are written and initially published. *Ibid.* The longer term enhances the present value of all works, since purchasers (*e.g.*, publishers) cannot predict which will be successful, much less which will be successful after a long delay. Amici's argument also ignores that authors (particularly later in life) have an incentive to establish a longer income stream to help support not only themselves, but children and grandchildren. Landes & Posner, *supra*, at 363 (noting that "bequest motives" can affect "people's decisions to work, save," and thus to create); S. Rep. No. 315, *supra*, at 11 ("One of the reasons why people exert themselves to earn money or acquire property is to leave a legacy to their children and grandchildren."). The Berne Convention copyright term is premised on the strength of that desire. See p. 25 & n.16, *supra*. James Madison himself exemplified both concerns. He provided for posthumous publication of his works in part because "antiquity" would give them a more "attractive character," and in part because he wanted to provide income to "his much younger wife, for whose support and comfort, he worried." See D. McCoy, *The Last of the Fathers* 164-165 (1989).

Petitioners are also incorrect to argue that upholding the CTEA would authorize a perpetual copyright through overlapping term extensions. Pet. Br. 13-14, 19. As an initial matter, Congress's traditional authority to extend copyright terms for both subsisting and future works enables Congress to select *shorter terms* in the first instance (as it did in 1831, 1909, and 1976), since those shorter terms can be replaced if they prove inadequate. More fundamentally, petitioners are mistaken in urging that the "limited Times" requirement can have "meaningful content" only if the Court—by modifying constitutional text and repudiating historical practice—creates a "line between *prospective* and *retroactive* extensions." *Id.* at 14. If Congress ever did adopt a term that was too long to be "limited," such an effort would be unconstitutional whether enacted in one statute or a series, and this Court surely could distinguish that term from the limited time protected under the CTEA.[18] Conversely, any statutory copyright term that qualifies as "limited" with respect to future works—regardless of its legislative evolution—is also "limited" with respect to existing ones. The Constitution bars perpetual copyrights, but it does not bar a

[18] Since, as we have described in detail, Congress rationally relied on traditional copyright considerations in establishing the CTEA's *limited* copyright term, petitioners' reliance (Br. 9, 11, 12, 19) on the concept of "outer limits" from *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), is wholly misplaced in this case. Moreover, *Lopez* and *Morrison* involved the boundaries between state and federal regulatory authority, not an attempt (like petitioners') to immunize conduct from the possibility of *any* government regulation. We note further that the anticipated average 95-year duration of copyrights under the life-plus-70-year standard resembles some other long-accepted durational practices in the law, such as 99-year leases of real property and bequests within the rule against perpetuities. See 6 *American Law of Property* § 24.16, at 51 (1952).

limited term, such as the life-plus-70-year standard, merely because it was established in two steps rather than one.

E. Applying The CTEA To Existing Works Is A Necessary And Proper Exercise Of Congress's Power

This Court has long recognized that a grant of power in Article I of the Constitution permits Congress to enact not only legislation that is "indispensably necessary" to the exercise of its enumerated powers, but also such provisions as Congress rationally deems "necessary and proper," U.S. Const. Art. I, § 8, Cl. 18, "convenient, or useful" thereto, *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 354, 413, 421 (1819). As this Court has pointedly explained:

> [The] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces in attempting to "secur[e] for limited Times to Authors * * * the exclusive Right to their respective Writings." * * * [I]t is not our role to alter the delicate balance Congress has labored to achieve.

Stewart v. *Abend*, 495 U.S. 207, 230 (1990); see *Sony Corp.*, 446 U.S. at 429 ("[I]t is Congress that has been assigned the task of defining the scope of the limited [rights] that should be granted authors or inventors in order to give the public appropriate access to their work product."); *Pennock* v. *Dialogue*, 27 U.S. 1, 17 (1829) (similar). "[If] the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity; as this would be to * * * tread upon legislative ground." *James Everard's Breweries* v. *Day*, 265 U.S. 545, 559 (1924); *The Legal Tender Cases*, 110 U.S. 421, 440 (1884).

Ignoring those decisions, petitioners advocate the application of "heightened scrutiny," by requiring "that any extensions be 'congruent and proportional' to proper Copyright Clause ends." Pet. Br. 31-32. Petitioners never requested congruence and proportionality review below. To the contrary, they conceded that it was only the "rare case where

Congress's judgment cannot stand." Pet. C.A. Br. 30. Petitioners also provide no basis for overruling the deferential standards established in *Abend* and *M'Culloch*. Instead, they rely on *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000), which concerned Section Five of the Fourteenth Amendment, not Article I of the Constitution. Those cases employed "congruence and proportionality" review because Congress lacks authority under Section 5 to "decree the substance" or "define" the rights at issue; it has authority only to "enforce by appropriate legislation" the substantive rights created by the Constitution itself. *City of Boerne*, 521 U.S. at 519.[19] By contrast, the Copyright Clause *does* grant Congress authority to define the scope of the substantive rights. Under the Constitution, "it is Congress that has been assigned the task of *defining* the scope of [rights] that should be granted to authors or inventors." *Sony Corp.*, 464 U.S. at 429 (emphasis added). Moreover, *Kimel* and *City of Boerne* implicated federalism and separation of powers concerns not present here.

Petitioners in any event do not argue that the Copyright Clause requires courts to evaluate every jot and tittle of each copyright enactment under heightened scrutiny to determine its effect on "progress." Instead, they urge this Court to find that applying a new copyright term to an existing work categorically and necessarily fails to promote

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[19] The Court has recognized that Congress, in enforcing the Fourteenth Amendment, may enact laws that sweep somewhat more broadly than the Fourteenth Amendment itself "[to] prevent unconstitutional actions." *City of Boerne*, 521 U.S. at 519. Absent review for "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," however, such remedial legislation could "become substantive in operation and effect," and could thereby expand the definition of constitutional rights rather than merely prevent the violation of such rights. *Id.* at 519-520. No comparable concerns arise in the copyright context.

progress.[20] Any such finding would be demonstrably incorrect.

1. *Congress's Longstanding Practice Of Providing Authors With The Benefit Of Subsequent Enactments Enhances Fairness And Incentives*

Congress has, since 1790, applied newly enacted copyright terms to future and subsisting works on an evenhanded basis. See pp. 8, 12-13, *supra*. As Representative Huntington declared in 1831, "justice, policy, and equity alike forb[id]" that an "author who had sold his [work] a week ago, be placed in a worse situation than the author who should sell his work the day after the passing of [the] act." 7 Cong. Deb. 424 (1831). That longstanding effort to ensure equitable operation of copyright law is itself sufficient to sustain the legislation as "necessary and proper," since the Constitution does not bar Congress from seeking to ensure that its enactments are substantively fair. Interests in efficient legal administration similarly support that result. Nothing in the Copyright Clause compels Congress to create a potentially unwieldy, two-tiered copyright system that grants works created the moment before a statutory amendment a term different from that applied to works created the moment after. Petitioners concede (Br. 28-30) that those important concerns were permissible justifications for the 1790 Act. They are likewise permissible justifications today.

Petitioners, moreover, err in arguing that Congress's treatment of authors of existing works does not affect incentives to create future works. To be sure, Congress cannot establish an incentive to create a work that already

[20] Petitioners' theory would also appear to preclude Congress from expanding the bundle of exclusive rights with respect to existing works, something Congress frequently has done. See 18 Cardozo Arts & Ent. L.J. at 704 (Prof. Ginsburg). See, *e.g.*, Act of July 8, 1870, ch. 230, § 86, 16 Stat. 212 (granting exclusive rights to dramatize and translate); Act of Mar. 4, 1909, ch. 320, § 1(b), (d) and (e), 35 Stat. 1075-1076 (adaptations and public performances). See also p. 20, *supra*.

exists. But Congress's treatment of authors who have already created undoubtedly affects the incentive for those authors and others to undertake future creations. For example, Congress's longstanding practice of giving authors with existing works the fair benefit of intervening legal changes —and altering copyright terms and the scope of protection for already created works in response to technological, demographic, and economic changes to ensure what Congress deems a "fair" return—enhances the value of the proffered reward.

That is true because, among other things, authors have a greater incentive to create new works where the government has a reputation for ensuring appropriate compensation and equitable results. As Professor Eisenberg has explained in an analogous context, "even a party who feels no moral need to deal fairly may agree to an appropriate modification" to an existing bargain "because he wants to develop or maintain a reputation for fair dealing, so that others will be more ready to contract with him." See M. Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. Rev. 1005, 1040 (1998).[21] Petitioners, moreover, cannot deny that Congress would promote progress if it included, as an *ex ante* inducement, in every copyright statute an express guarantee that authors would receive the benefit of any later legislative enhancements to the scope of

[21] See E. Zajac, *The Political Economy of Fairness* 101 (1995); R. Posner, *An Economic Analysis of Law* 373 (5th ed. 1998) (explaining that one without a "reputation for fair dealing" would "have to pay * * * higher wages"); B. Black & R. Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 Harv. L. Rev. 1911, 1940 (1996); A. Meese, *Regulation of Franchisor Opportunism and Production of the Institutional Framework*, 23 Harv. J.L. & Pub. Pol'y 61, 68 (1999) (if "reputation for fair dealing deteriorates," that "reduc[es] the price" an entity "can command"); L. Bernstein, *Private Commercial Law in the Cotton Industry*, 99 Mich. L. Rev. 1724, 1748 (2001) (explaining that "reputation" is often "reflected in the selection of transactional partners as well as in the transaction price").

copyrights.[22] Nothing in the Constitution bars Congress from establishing the same incentive by adopting the same approach as a matter of unbroken practice. See pp. 1-3, 8, 13, *supra*. Even if the wisdom of that approach were debatable, Congress "may implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim." *Graham*, 383 U.S. at 6.

In *United States* v. *Hall*, 98 U.S. 343 (1878), this Court applied similar logic in interpreting Congress's power "to * * * raise and support armies, provide and maintain a navy, and make rules for the government and regulation of the land and naval forces." In examining Congress's authority to offer "[b]ounties * * * to promote enlistments, and pensions to the wounded and disabled * * * as like inducements," the Court held that "*[p]ast services may also be compensated*," and that pensions could be "granted to those who were wounded, disabled, or otherwise rendered invalids * * * *even in cases where no prior promise was made or antecedent inducement held out.*" *Id.* at 351 (emphasis added). Under petitioners' theory, such compensation would be impermissible because the government cannot "raise the army" or "provide for or maintain a navy" by rewarding one who has already served and (being disabled) is unlikely to serve again. But this Court held that such post-performance benefits are "necessary and proper" to exercising that enumerated power, see *ibid.*, indicating both that treating former service members fairly is itself a necessary and proper exercise of congressional authority, and that such treatment helps recruitment by showing potential future service members that they will be treated equitably regardless of when their contribution occurs.

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[22] Indeed, it is well established that such "most favored nation" rights increase the value of the offered bargain. W. Schwartz & A. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation*, 16 Int'l Rev. L. & Econ. 27, 29 (1996).

Similar fairness concerns are especially pertinent with respect to the CTEA, because Congress found that the prior copyright term had failed "to keep pace with the substantially increased commercial lives of copyrighted works resulting from the rapid growth in communications media," so that copyright holders typically received a smaller fraction of their works' total value. O. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. Pitt. L. Rev. 719, 728 (1998).[23] Such effects were exacerbated by increased human longevity, delayed childbirth, and increased piracy, all of which contributed to the likelihood that an author's revenues from his creative works were less likely to support his (younger) heirs during their (longer) lifetimes, even though the overall social value of the author's works had increased.[24] Particularly in light of Congress's "constitutional authority and institutional ability to accommodate fully the varied permutations of competing interests," *Sony*, 464 U.S. at 431, the legislative judgment that the CTEA fairly compensates authors of future and existing works, and that the historical pattern of such fair treatment enhances incentives for future creativity, warrants substantial deference.

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[23] See, *e.g.*, *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. 86 (1997) (*1997 Hearing*) (statement of George David Weiss, President, Songwriters Guild of America).

[24] Experience under the 1976 Act convinced Congress that the pre-CTEA term did not adequately secure "the right to profit from licensing one's work during one's lifetime and to take pride and comfort in knowing that one's children—and perhaps their children—might also benefit from one's posthumous popularity." 141 Cong. Rec. 6553 (1995) (statement of Sen. Feinstein). Changes in "[h]uman longevity" were "increasingly undermining this fundamental precept of copyright law." *Ibid.*; see 144 Cong. Rec. S12,377-S12,378 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch). See also pp. 25-26 & n.16, *supra*.

2. *The CTEA's Application To Existing Works Increases Incentives For Copyright Holders To Restore And Disseminate Their Works*

Applying the CTEA's copyright term to subsisting copyrights also enhances the incentive for copyright holders "to restore older works and further disseminate them to the public." H.R. Rep. No. 452, 105th Cong., 2d Sess. 4 (1998); S. Rep. No. 315, *supra*, at 13. Recent technologies produce new opportunities for such efforts:

> Until now, copyrighted works have been fixed in perishable media, such as records, film, audiotape, paper or canvas. * * * The digital revolution offers a solution to the difficulties of film, video and audio preservation, and offers exciting possibilities for storage and dissemination of other types of works as well.

Ibid. Granting a longer term for existing works creates greater incentives for copyright holders to digitize, distribute, restore, or otherwise exploit those works. See Pet. App. 27a; see also *id.* at 12a-13a; H.R. Rep. No. 452, *supra*, at 4; S. Rep. No. 315, *supra*, at 13. Absent such exclusive rights, few could risk a substantial commercial investment in restoration because, after they sold a single copy, the work could be digitally reproduced and redistributed globally by others who had made no such investment. S. Rep. No. 473, 94th Cong., 1st Sess. 117 (1975) (noting that "lack of copyright protection" can "restrain[] dissemination of a work, since publishers and other users cannot risk investing" absent copyright).[25]

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[25] See 141 Cong. Rec. 6555 (1995); *The Copyright Term Extension Act of 1995: Hearing on S. 483, Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 42 (1995) (*1995 Senate Hearing*) (statement of Jack Valenti) ("Whatever work is not owned is a work that no one protects and preserve[s]. * * * There is no one who will invest the funds for enhancement because there is no longer an incentive to rehabilitate and preserve something that anyone can offer for sale."); *1997 Hearing* 47 (statement of Fritz Attaway, Senior Vice President, Government Relations, Motion Picture Association of America) ("[C]opyright holders are given the incentive not only to create works, but they also are given an incentive to continue to distribute them and keep them in circulation").

Insofar as petitioners assert that restoration does not promote progress, they are mistaken. Without restoration, many works would be lost forever. Restoring those works to a usable form and disseminating them publicly promotes progress by exposing the public to expression that might otherwise be lost or remain secret. See *Sony*, 464 U.S. at 431-432 (describing the ultimate goal of copyright as "promoting *broad public availability* of literature, music, and the other arts") (quoting *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975) (emphasis added)). Here, Congress reasonably determined that a longer limited period of copyright would encourage holders of many older copyrights to invest the substantial sums necessary to restore and distribute them. That judgment is not only rational, but has proved correct. As amicus MPAA points out (Br. 15-20, 23-24), the film industry has responded to the CTEA by investing substantial sums in the restoration and dissemination of works that would otherwise never reappear in usable form.

Although petitioners profess concern that works with "old and untraceable copyrights" may not be restored or disseminated unless they fall into the public domain, Pet. Br. 44-45, such concerns are overstated and should not invalidate Congress's judgment. Congress concluded that "most material which is considered to be of continuing or potential commercial value" is never so abandoned, and that many abandoned works are "of practically no value to anyone." H.R. Rep. No. 1476, *supra*, at 136. By extending copyright terms, Congress permissibly focused on protecting the relatively few works that retain their long-term value, rather than the countless mass of works that lack such value. And Congress permissibly decided that, during the last twenty years of a work's CTEA copyright term, the established system of proprietary incentives would better serve

the public's interest in restoration and distribution than would the non-proprietary public domain, which affords little incentive to make substantial restoration and distribution investments. "[T]he advantage of the 'public domain' as a device for making works more available to the public is highly overrated; especially if availability is equated with 'low cost' to the public." *1995 Senate Hearings* 15-16 (quoting testimony of Irwin Karp). Accord *id.* at 41-42 (testimony of Jack Valenti) (noting that under actual marketplace conditions, public domain works do not circulate more widely or cheaply); *id.* at 218 (similar) (testimony of Assistant Secretary of Commerce and Commissioner of Patents and Trademarks Bruce Lehman); 141 Cong. Rec. 6555 (1995) ("[T]here is very little evidence that the consumer really benefits economically from works falling into the public domain.") (Prof. Miller). Congress, moreover, has addressed the issue of orphaned works and the interests of historians, archivists, and other specialists, through 17 U.S.C. 108. Section 108(h) allows libraries, archives, and similar institutions to "reproduce" *and* "distribute, display, or perform in facsimile or digital form" copies of certain published works "during *the last 20 years* of any term of copyright * * * for purposes of preservation, scholarship, or research" if the work is not already being commercially exploited and further copies are not available at a reasonable price. 17 U.S.C. 108(h) (emphasis added). Congress has thus heard the concerns of petitioners and their amici. H.R. Rep. No. 1476, *supra*, at 136. Petitioners simply object to the balance Congress struck.

Ultimately, petitioners and their amici seek to show that Congress pursued bad public policy in assigning the last twenty years of CTEA's term to copyright holders and their licensees, rather than to public domain copyists like themselves. But such contentions are appropriately directed to Congress, as petitioners and their amici understood. *1995 Senate Hearing* 71-90 (statements of law professors); see also *id.* at 6-27, 40-42 (contrary views). Having failed to

convince Congress, see S. Rep. No. 315, *supra*, at 12 ("The Committee believes that the basic functions of copyright protection are best served by the accrual of the benefits of increased commercial life to the creator."), petitioners seek to reopen the same debate in this Court.

3. *The CTEA's Impact On International Trade Promotes Progress In The United States*

Congress's decision to apply the life-plus-70-year term to subsisting copyrights is also supported by international trade concerns. In 1995, one of the United States' largest trading partners—the European Union—directed member nations to establish a copyright term of life-plus-70-years. 144 Cong. Rec. S12,377-S12,378 (daily ed. Oct. 12, 1998). All current members have complied, and additional countries seeking to join the European Union have followed suit. The Senate Judiciary Committee assessed those changes' impact:

> Uniformity of copyright laws is enormously important to facilitate the free flow of copyrighted works between markets and to ensure the greatest possible exploitation of the commercial value of these works in world markets for the benefit of U.S. copyright owners and their dependents. Indeed, in an age where the information superhighway offers widespread distribution of copyrighted works to almost anywhere in the world at limited costs, harmonization of copyright laws is imperative to the international protection of those works and to the assurance of their continued availability.

S. Rep. No. 315, *supra*, at 8.[26]

Consistent with the Berne Convention, the European Union has directed its members to apply "the rule of the

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[26] See also *1995 Senate Hearing* 20 ("The Copyright Office believes harmonization of the world's copyright laws is imperative if there is to be an orderly exploitation of copyrighted works," particularly given "the development of the global information infrastructure [that] makes it possible to transmit copyrighted works directly to individuals throughout the world.").

shorter term," under which protection for foreign (*e.g.*, United States) works is "not [to] exceed the term fixed in the country of origin of the work." P. Goldstein, *International Copyright* § 5.3, at 239 (2001) (*International Copyright*) (quoting Berne Conv. Art 7(8)). Consequently, if Congress had not altered the United States copyright term for subsisting works, American authors of such works would receive less protection in Europe than their European competitors. Congress acted permissibly in "securing," for a "limited Time[]," American authors' "Right to their respective Writings" in Europe on an equal basis with European authors.

By enhancing the rights of all American authors abroad, Congress also rendered the United States a more attractive place to create and publish in the first instance. Since European copyright evaluates a work's "country of origin" based on where the work is first published, authors have significant incentives to "select the place of first publication with an eye to the country that will provide the longest term of protection under" the Berne Convention's "comparison of terms," see *International Copyright* § 5.3, at 241, especially if that country may also adjust subsisting works' copyright terms to meet changed circumstances. By establishing parity for existing and future works' copyright terms, the CTEA promotes progress by bolstering authors' incentive to publish their works first in this country. Cf. 7 Cong. Deb. App. 119 (1830) (remarks of Rep. Ellsworth) (explaining that the 1831 Copyright Act attempted "to place authors in this country more nearly upon an equality with authors in other countries").

In enacting the CTEA, Congress also determined that significant revenues could be generated by providing equitable treatment for United States copyrights abroad, thereby stimulating the creation and production of new works in the United States:

> [E]xtended protection for existing works will provide added income with which to subsidize the creation of new works. This is particularly important in the case of corporate copyright owners, such as motion picture studios and publishers, who rely on the income from enduring works to finance the production of marginal works and those involving greater risks (i.e., works by young or emerging authors).

S. Rep. No. 315, *supra*, at 12-13. See also *1997 Hearing* 90; *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.*, 104th Cong., 1st Sess. 671-672 (1995) (statement of Lisa M. Brownlee). While petitioners' amici contend that increasing income of existing copyright holders (particularly institutional ones) will not spur them to invest in additional creative endeavors, in fact investment within an industry strongly correlates with current income. See O. LaMont, *Cashflow & Investment: Evidence From Internal Capital Markets*, 52 J. Fin. 83, 84, 105-106 (1997) (noting strong correlation, and confirming causative relationship in industry under review). That empirical controversy is for the legislature, not the judiciary, to resolve. And Congress's decision to match certain international copyright standards lies fully within Congress's constitutional authority. See *Sony*, 464 U.S. at 429; *Aiken*, 422 U.S. at 156; *Goldstein* v. *California*, 412 U.S. 546, 555 (1973).

II. THE CTEA IS CONSISTENT WITH THE FIRST AMENDMENT

Petitioners also assert that Congress's 210-year-old practice of applying new copyright terms evenhandedly to subsisting and future works offends the First Amendment. That claim cannot be reconciled with this Court's decision in *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985), which concluded that copyright protection—

even as applied to works of great public and political importance—is consistent with the First Amendment.

A. The CTEA Survives First Amendment Scrutiny Consistent With *Harper & Row*

In *Harper & Row*, a magazine published verbatim excerpts of President Ford's not-yet published autobiography in violation of Harper & Row's copyright. Defending against an infringement action, the magazine argued that "First Amendment values required" the Court to permit the excerpts' publication. *Harper & Row*, 471 U.S. at 555-556. Rejecting that argument, the Court held that free speech safeguards within the copyright system sufficiently protect First Amendment interests and render further judicial intervention unnecessary. The Court explained that, because copyright laws protect only the author's particular expression, they do not interfere with the free communication of facts or ideas. 471 U.S. at 556. The Court also observed that copyright law protects First Amendment interests through the "fair use" doctrine, which allows public use of an author's copyrighted expression "in a reasonable manner without his consent." 471 U.S. at 550; see 17 U.S.C. 107.

"In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use," the Court concluded that the First Amendment does not require further restrictions on copyright protection. 471 U.S. at 560. *Harper & Row* thus teaches that the First Amendment impact of copyright restrictions is exceedingly modest, since such restrictions mainly bar commercial competitors only from exploiting an author's own creative expression.

Since *Harper & Row* was decided, courts have generously applied the idea/expression dichotomy, the fair use doctrine, and related rules to safeguard First Amendment values. Consistent with those doctrines, the public may copy

copyrighted forms of expression where "necessary to adequately convey the facts" or where the expression is "so integral to the idea expressed as to be inseparable from it." *Harper & Row*, 471 U.S. at 563. "When there is essentially only one way to express an idea, the idea and its expression are inseparable and copyright is no bar to copying that expression." *Yankee Candle Co.* v. *Bridgewater Candle Co.*, 259 F.3d 25, 35-36 (1st Cir. 2001).[27] And, consistent with this Court's decision in *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-582 (1994), courts have held that fair use protects a critic's appropriation of otherwise "protected elements of an original work of authorship to communicate her criticism" of the original work "without infringing the copyright." *Suntrust Bank* v. *Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001); *id.* at 1269-1276 (finding "Wind Done Gone" a permissible fair use parody of "Gone With The Wind," despite appropriation of significant original elements). See also P. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1135-1136 (1990) (Fair use should not be an "occasionally tolerated departure" from copyright but "a necessary part of the overall design" which "stimulat[es] productive thought and public instruction without excessively diminishing the incentives for creativity.").

Here, no less than in *Harper & Row*, those safeguards ensure that copyright contributes to rather than detracts from free debate. The CTEA does not bar the appropriation of facts and ideas within copyrighted works, nor does it limit the scope of fair use. Congress, moreover, has established additional exceptions during the 20 years added by the CTEA's copyright term. See 17 U.S.C. 108(h); p. 36, *supra*. Thus, while petitioners are undoubtedly correct that copyright law would not be "immune" from First Amendment attack if Congress "eliminate[d] the idea/expression distinc-

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[27] Accord *Ets Hokin* v. *Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000); *Veeck* v. *Southern Bldg. Code Cong. Int'l, Inc.*, No. 99-40632, 2002 WL 1270117, at *8-*9 (5th Cir. June 7, 2002) (en banc).

tion," "constrict[ed] the scope of fair use" beyond traditional boundaries, or established viewpoint or content discriminatory standards, Pet. Br. 35, *Harper & Row* establishes that First Amendment concerns are amply protected by copyright law where, as here, Congress has done none of those things.

Petitioners seek to distinguish *Harper & Row* by claiming that it "establish[es] a presumption against the need to engage in a First Amendment analysis every time a *copyright owner seeks to enforce his copyright* against an infringer," but does not govern "whether a copyright law has permissibly struck the balance between copyright and free speech at the outset." Pet. Br. 35, 36 (emphasis added). That distinction is "illusory." Pet. App. 6a-7a. Precisely the same legal question—whether the CTEA strikes a balance that is consistent with the First Amendment—can arise either in an abstract facial challenge like petitioners', or in a concrete dispute where a "copyright owner enforces his" CTEA-granted "copyright against an infringer," and the infringer challenges the CTEA's validity by way of defense. The question in both contexts is whether the First Amendment guarantees a right to exploit statutorily protected expression during the term specified by law.

Alternatively, petitioners attack *Harper & Row*'s reliance on the idea/expression dichotomy and fair use doctrines, arguing that they are "irrelevant to the First Amendment interests protected by limitations on the duration of copyright." Pet. Br. 36.[28] But petitioners cannot explain why they lack any First Amendment right to exploit a work on the last day of its original term, yet such rights suddenly appear on the first day of an extended term. In fact, petitioners' efforts to distinguish *Harper & Row* derive solely from, and add nothing to, their arguments concerning Congress's power under the Copyright Clause. And petitioners cannot show that the First Amendment was intended to allow unrestricted use of copyrighted expressions *before* they enter the public domain, *i.e.*, before expiration of the "limited Time[]" prescribed by Congress. Thus, if petitioners' interpretation of the Copyright Clause is rejected, their First Amendment claim must fail as well. Besides, the infringers in *Harper & Row* asserted a similarly time-sensitive right to publish an author's protected work, asserting that "First Amendment values" favored public dissemination of such expression "as soon as possible." *Harper & Row*, 471 U.S. at 556-557. This Court rejected that claim, holding that copyright accords authors the right to decide when to publish and that such rights are fully consistent with the First Amendment. *Id.* at 559-560.

Nor are petitioners correct in suggesting (Br. 36) that a "substantial content-neutral interest[]" was required in *Harper & Row*. *Harper & Row*, like many of the Court's cases, does recognize that copyright law as a whole encourages free expression, *Harper & Row*, 471 U.S. at 558. But this Court has never applied intermediate scrutiny to require that each provision of copyright law promote free expression. See pp. 45-47 & n.29, *infra*. Indeed, even though a broader fair use exception would have accelerated the dissemination of President Ford's autobiographical comments, *Harper & Row* held that the "the First Amendment protections already embodied in the Copyright Act[]" sufficiently preserved First Amendment values. 471 U.S. at 560. Those protections support the same conclusion here.

B. The CTEA Does Not Impermissibly Restrict Speech

Although the CTEA removes no works from the public domain, petitioners fault it because longer copyright terms reduce the rate at which copyrightable original expressions (but not ideas or facts) enter the public domain. Pet. Br. 37-

[28] To the extent petitioners suggest that "fair use" applies *only* to non-commercial uses (Br. 36), they are incorrect. Whether a work is commercial or non-commercial is only a single (and often unimportant) factor in determining whether a use is "fair." *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 583-584 (1994).

39. As a general matter, copyright promotes rather than inhibits free speech and public access to facts and ideas. *Harper & Row*, 471 U.S. at 558; *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 526-527 (1994). The copyright term established by the CTEA has that effect as well. By continuing Congress's longstanding policies of "fair treatment" and ensuring "fair returns," the CTEA seeks to preserve an environment that encourages the creation of new works. See pp. 30-33, *supra*. Moreover, the Act prompts copyright holders and their licensees to undertake constitutionally significant restoration, distribution, and derivative exploitation of existing works. See pp. 34-37, *supra*. The facts and ideas contained in all of those creations, whether original or derivative, fall immediately into the public domain; indeed, even otherwise protected expression is immediately subject to fair use comment, criticism, and review. See pp. 40-41, *supra*; *Harper & Row*, 471 U.S. at 558 ("[T]he Framers intended *copyright itself* to be the engine of free expression. By establishing a marketable right to * * * one's expression, copyright supplies the economic incentive to create and *disseminate ideas*.") (emphasis added).

Moreover, rather than granting windfall benefits, Pet. Br. 23, 41-42, the CTEA allows copyright holders an opportunity to profit from their creative property *to the extent* that they succeed in making the works publicly available. Absent some distribution effort, no return can be garnered. That is significant, since copyright law serves the public interest not merely by promoting creativity, but also by encouraging copyright holders to publish and disseminate works (and the ideas and facts therein) and thereby contribute to public discourse. See pp. 34-35, *supra*.

Finally, petitioners misstate the CTEA's effect on public access to knowledge. Pet. Br. 7, 46. Knowledge itself is free; only exploitation of proprietary expression is temporarily restricted. Indeed, notwithstanding the CTEA's term, the public has never before possessed such ready and affordable access to so much information as it does today. Far from

depleting that cultural reservoir, Congress believed that the CTEA would enhance and promote it, by giving authors and copyright holders an incentive to distribute their works (or to license others to do so) by all viable means, commercial or otherwise, including the Internet and other digital technologies touted by petitioners and their amici. See also *Stewart*, 495 U.S. at 229 ("[P]etitioners' true complaint is that they will have to pay more for the use of works they have employed in creating their own works. But such a result was contemplated by Congress and is consistent with the goals of the Copyright Act.").

Moreover, while petitioners and their amici profess concern that certain "orphaned" works may not be exploited or restored by copyright owners during the CTEA's term, Pet. Br. 44-45; Hal Roach Studios Br. 11-17; pp. 35-36, *supra*, petitioners cannot guarantee that, absent the CTEA, they would make any significant number of such works—which lack any "workable market" or sizeable public demand, Hal Roach Br. 20—available where copyright holders will not. Nor do they show that such works are more valuable than the works copyright holders will now restore and distribute because of the CTEA. In any event, Congress offered a special exception for such orphaned works during the last 20 years of the CTEA's copyright term, see p. 36, *supra*, and any further special exception also must be sought from Congress. See *Stewart*, 495 U.S. at 228 (rejecting argument that "many fewer works [would reach] the public," because such grievances "are better addressed by Congress").

C. Petitioners' Novel Request For Intermediate Scrutiny Should Be Rejected

Petitioners cite no copyright decision that has ever rejected the analysis employed in *Harper & Row*, or that has invalidated a copyright enactment by employing intermediate scrutiny. Nonetheless, petitioners urge the Court to invalidate the CTEA by applying intermediate scrutiny similar to that in *Turner Broadcasting System, Inc.* v. *FCC*,

512 U.S. 622, 662 (1994) (*Turner I*), and its progeny, cases that involve entirely different considerations. The statute at issue in *Turner I* required cable operators to carry and transmit broadcast stations through the cable operators' proprietary cable systems. Such must-carry provisions, the Court explained, implicate "the heart of the First Amendment," namely, "the principles that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Id.* at 642. Those provisions, moreover, "impose[d] special obligations upon cable operators and * * * cable programmers" beyond the obligations placed on all others. *Id.* at 641.

The CTEA and copyright law, by contrast, do not force anyone to reproduce potentially disagreeable expression, and they apply across the board to all who would exploit others' protected expression. Thus, while petitioners assert that there are free speech interests on both sides of this case, Pet. Br. 37, petitioners' "speech" interests hardly compare to those in *Turner*. Petitioners do not seek to avoid compelled speech, to vindicate the expression of particular viewpoints or ideas (which copyright law places in the public domain), or to protect the fair use of protected expression for comment and debate (which copyright law also protects). Instead, petitioners assert a novel constitutional right to exploit others' creative expression indiscriminately during the proprietary exclusive term established by Congress.

Moreover, by requesting intermediate scrutiny, petitioners appear to advocate an unprecedented and virtually limitless "need for First Amendment inquiry into whether" each and every feature of "copyright law has permissibly struck the balance between copyright and free speech at the outset." Pet. Br. 36-37. Petitioners thus propose, as examples of laws that must be "tested under" intermediate scrutiny, Congress's prohibition against "copying" works as well as "publishing" them; statutory rights to produce "derivative" works that include protected expression from an original work; and the application of copyright law to the

Internet. *Id.* at 38-39. Petitioners also seem to contemplate judicial balkanization of copyright terms according to the type of work at issue, subjecting the term for each type of work—whether it be film, book, or computer program—to heightened judicial review to ensure that it strikes the proper balance. *Id.* at 46-47. Despite petitioners' claim that deciding whether a prospective term of "50 years is enough, or 70 years is too much, is not a judgment meet for this Court" under the Copyright Clause, Pet. Br. 14, petitioners seem to argue that federal courts must make precisely those determinations under the First Amendment, and for each category of work. *Id.* at 40 n.14 (requesting "remand for an evidentiary hearing under the *Turner* standard on the prospective extension"); *id.* at 46 (proposing a distinction between film and other works). Indeed, although petitioners purport to identify distinct "First Amendment interests raised by copyright's duration," *id.* at 36, the putative interests correlate to the *length* and *scope* of copyright protection, not to whether the term is applied to a preexisting or future work.[29]

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[29] Petitioners' theory thus would draw into question virtually every expansion of rights, covered works, or copyright terms that Congress has ever enacted in response to changing technology and circumstances, including the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2, 109 Stat. 336, insofar as it grants a digital performance right to copyright owners of already existing and future sound recordings, and insofar as it constrains the ability of third parties to perform those works publicly; the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, § 2, 113 Stat. 1774, which increases the limits on statutory damages for infringement of existing and future works; and the other innumerable expansions Congress has enacted over the past two centuries. See p. 30 n.20, *supra* (other examples). As Professor Smolla has observed, it "would be both impertinent and impractical to superimpose an omnibus 'strict scrutiny' standard on the complex statutory schemes characteristic of intellectual property law. * * * The Supreme Court has never held, or even *intimated*, that Congress is subject to [such] searching superintendence * * * for every difficult policy choice it makes * * * . To the contrary, all of our intellectual property jurisprudence suggests that the accommodation

The Constitution textually entrusts the selection of "limited Times" to the political branches in the first instance. So long as the selected durations comport with the requirement of being "limited," there is no basis for courts to second-guess Congress's determinations under a heightened standard of review.[30] Indeed, acceptance of petitioners' novel standard could destabilize current copyright law—undermining the incentives that copyright is supposed to create—by threatening to invalidate heretofore unquestioned rights. Petitioners fail to make a sufficient case for so profoundly disrupting the existing legal framework by abandoning this Court's considered approach in *Harper & Row*.[31]

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between freedom of expression and protection of intellectual property is effectuated *in gross*, through the large structural elements of intellectual property that serve the function of mediating between ownership in expression and free trade in expression." R. Smolla, *Information As Contraband*, 96 Nw. U. L. Rev. 1099, 1157 (2002).

[30] Even if this Court were to apply some form of "intermediate scrutiny," the CTEA would survive such scrutiny. Indeed, in *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522 (1987), this Court upheld the U.S. Olympic Committee's (non-copyright, unlimited time) authority to prohibit certain uses of the term "Olympic." Restrictions on the "manner" in which the petitioner sought to "convey its message," the Court explained, were justified by the government's interest in "ensur[ing] that the USOC receives the benefit of its own efforts," and in generally promoting the participation of amateur athletes in the Olympic Games. *Id.* at 537.

[31] Petitioners also argue that, if the Court holds the CTEA's application to subsisting copyrights unconstitutional, it should strike down the extension for future works as inseverable. Pet. Br. 48-50. The court of appeals did not consider severability, and there is no reason for this Court to address that statute-specific issue—which focuses on congressional intent—in the first instance. See, *e.g.*, *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987). In any event, there is no indication in the legislative history that Congress would have wanted the prospective extension of the CTEA to be invalidated if the Court declined to sustain the separate and independent provisions extending the term of subsisting works. To the contrary, Congress's reasons for the term extension (parity with the European Union's term; adjusting for increased piracy and life spans; and promoting progress generally) apply with separate (and by petitioners' claims, greater) force to the extension for future works.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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